In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 420

CHARLES McDANIEL, ET AL., PETITIONERS

v.

JOSEPH BARRESI, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted to express the government's interest in this case, to state our view of the arguments supporting the petition for a writ of certiorari, and to suggest that the petition should be granted and that the decision below should be summarily reversed.

INTEREST OF THE UNITED STATES

Under various provisions of the Civil Rights Act of 1964, the United States has important responsibilities for enforcing the Fourteenth Amendment's guaranty of equal educational opportunity. Because this litigation involves an interpretation of those provisions, as well as a construction of this Court's school

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desegregation decisions, its disposition will affect the government's ability, particularly in the State of Georgia, to enforce that guaranty effectively.

STATEMENT

The school desegregation plan involved in this litigation was devised by the Clarke County Board of Education and approved by the United States Department of Health, Education, and Welfare.[1] The plan is concerned only with the Clarke County elementary schools. For the most part, the plan employs geographic zones drawn to promote desegregation; but the board determined that zoning alone was insufficient to meet what it deemed to be a desirable racial distribution of students,[2] and, accordingly, the board

[1] The Clarke County Board of Education is a recipient of federal financial assistance. The application for and receipt of that aid, along with the acceptance of those conditions which federal law requires all recipients to accept, creates a "binding contract." *United States* v. *Lovett*, No. ED-68-C-30 (E.D. Ark., August 28, 1968); *United States* v. *Sumter County School District No. 2*, 232 F. Supp. 945, 950 (E.D. S.C.); *United States* v. *County School Board, Prince George County*, 221 F. Supp. 93, 99 (E.D. Va.); *Lemon* v. *Bossier Parish School Board*, 240 F. Supp. 709, 713 (W.D. La.), affirmed, 370 F.2d 847 (C.A. 5), certiorari denied, 388 U.S. 911. Cf. *United States* v. *Frazer*, 297 F. Supp. 319 (M.D. Ala.). The pertinent terms and conditions of the school district's contractual obligations are defined by Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, and by the rules and regulations promulgated by the Secretary of HEW, with the express approval of the President, published at 45 C.F.R. Part 80. The desegregation plan in issue was submitted to HEW in order to satisfy those conditions and thereby remain eligible for federal aid.

[2] The school board decided to seek to achieve a 20 to 40 percent black enrollment in each school, although the board regarded that formula simply as a guideline and the plan calls for two schools with about 50 percent black enrollment.

assigned certain racially identifiable "pockets" across racial lines.[3] The Clarke County school system operated under that plan during the 1969–1970 academic year.

The present suit to enjoin the operation of the plan was brought by parents of children attending schools in the district. The trial court denied the injunction (Pet. App. 23–29), and, on appeal, the Supreme Court of Georgia reversed (Pet. App. 16–22).

The Georgia Supreme Court ordered further operation of the plan permanently enjoined on the grounds that it "neither squares with the Fourteenth Amendment nor its interpretation by the United States Supreme Court holding that 'racial discrimination' is unconstitutional" (Pet. App. 20), and that it violates Sections 401(b) and 407(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000c(b) and 2000c–6(a) (Pet. App. 21).

REASONS FOR GRANTING THE WRIT

We believe the Georgia Supreme Court erred on both grounds and that, if its decision is allowed to stand, efforts to complete the desegregation of the Georgia public schools may be greatly hindered.

1. While the Georgia Supreme Court's opinion does not openly dispute the proposition that school systems

[3] Where the distance between the student's residence and his school is more than 1½ miles, free transportation is provided. Transportation expenses under the plan in issue would be $11,070 less than the school district spent on transportation during the 1968–69 school year under dual operation (R. 225).

formerly segregated de jure must take affirmative steps to overcome the consequences of their own discrimination, *Green* v. *County School Board,* 391 U.S. 430, 438, n. 4, its decision renders that mandate illusory by insisting that the school board refrain from considering race in the formulation of its student assignment policies. In short, the court invoked the simplistic theory that the Constitution is "color blind" for all purposes and that it precludes benign as well as invidious uses of race by the State.[4]

This view of the Constitution has been uniformly rejected by the federal courts, which have recognized that "[a]t this point, and perhaps for a long time, true nondiscrimination may be attained, paradoxically, only by taking color into consideration." *Youngblood* v. *Board of Instruction of Bay County Florida,* No. 29369 (C.A. 5, July 24, 1970). In *Jefferson I* the Court of Appeals for the Fifth Circuit elucidated this concept as follows:

> The Constitution is both color blind and color conscious. * * * [T]he Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination. The criterion is the relevancy of color to a legitimate governmental purpose. * * *
>
> Here race is relevant, because the governmental purpose is to offer Negroes equal edu-

[4] The court explained the theory as follows (Pet. App. 20):

> Nor can it be argued that "effective inclusion" because of race is different from "effective exclusion" because of race. Within the proscription of the Fourteenth Amendment, we see no difference. One is just as discriminatory as the other.

> cational opportunities. The means to that end, such as disestablishing segregation among students, distributing the better teachers, equitably, equalizing facilities, selecting appropriate locations for schools, and avoiding resegregation must necessarily be based on race.

United States v. *Jefferson County Board of Education,* 372 F.2d 836, 876–877 (C.A. 5), affirmed on rehearing, 380 F.2d 385 (C.A. 5) (en banc), certiorari denied *sub nom. Caddo Parish School Board* v. *United States,* 389 U.S. 840. See, also, *Board of Public Instruction of Duval County* v. *Braxton,* 402 F.2d 900 (C.A. 5); *United States* v. *Board of Public Instruction of Polk County,* 395 F.2d 66 (C.A. 5); *Wanner* v. *County School Board of Arlington County,* 357 F. 2d 452 (C.A. 4); *Dowell* v. *School Board of Oklahoma City,* 244 F. Supp. 971 (W.D. Okla.), affirmed, 375 F.2d 158 (C.A. 10), certiorari denied, 387 U.S. 931. This concept lies at the heart of this Court's holding in *Green* v. *County School Board, supra,* that a school board's constitutional obligation is not discharged by simply ceasing to require racial segregation: In *Brown II* "[s]chool boards * * * then operating state-compelled dual systems were * * * clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." 391 U.S. at 437–438. Indeed, this Court's approval of the faculty-desegregation formula of *United States* v. *Montgomery County Board of Education,* 395 U.S. 225, was necessarily based on the premise that race would be taken into account

in implementing the remedy. See, also, *Louisiana* v. *United States,* 380 U.S. 145, 154; *Green* v. *County School Board, supra,* at 438, n. 4; *Carter* v. *Jury Commission,* 396 U.S. 320, 340.

2. Equally unsound is the Georgia Supreme Court's notion that the school board's plan violates Sections 401(b) and 407(a) of the Civil Rights Act of 1964.[5] Those provisions, applying only to federal courts and officials, do not purport to be prohibitions but are simply disclaimers of granting new power to federal authorities to deal with purely adventitious, de facto segregation. Thus, they have no effect whatever on the powers of a school board. See, *e.g., United States* v. *Jefferson County Board of Education, supra,* 372 F. 2d at 878–886; *United States* v. *School District 151,* 286 F. Supp. 786 (N.D. Ill.), affirmed, 404 F. 2d 1125 (C.A. 7); *Spangler* v. *Pasadena City Board of Education,* 311 F. Supp. 501 (C.D. Cal.); *Keyes* v. *School District Number One, Denver, Colo.,* 303 F. Supp. 289 (D. Col.); *Swann* v. *Charlotte-Mecklenburg Board of Education,* No. 14,517 at 20–21 (C.A. 4, May 26, 1970). See, also, 110 Cong. Rec. 1518, 1598, 12714, 13820 (1964).

3. Finally, this case does not involve the issue whether the plan adopted by the school board is required by minimum constitutional requirements. For it is clear that a school board has full discretion to go beyond minimum constitutional mandates in achieving desegregation. See, *e.g., Offermann* v. *Nitkowski,* 378

[5] The pertinent portions of each Section are set forth at pages 7–8 of the petition.

F.2d 22 (C.A. 2); cf. *Taylor* v. *Cohen*, 405 F.2d 277, 282 (C.A. 4). To hold otherwise "would be to discourage voluntary action by enlightened public officials attempting to correct one of the underlying causes of racial tension in this Nation." *Norwalk Core* v. *Norwalk Board of Education*, 298 F. Supp. 213, 226 (D. Conn.), affirmed, 423 F.2d 121 (C.A .2).

The essence of this Court's mandate in school desegregation cases has been that school officials must act affirmatively to overcome the effects of racial dualism in education. Because the holding of the court below would obliterate that mandate, its decision is clearly inconsistent with the decisions of this Court and other federal courts on questions of federal law and is, therefore, erroneous. In these circumstances, it would be appropriate for this Court to grant the petition and summarily reverse the judgment below.

CONCLUSION

For the foregoing reasons, we respectfully suggest that the petition for a writ of certiorari should be granted and that the judgment below should be summarily reversed.

Respectfully submitted.

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